UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

DIAMOND TRUCKING INC.

and Case No. 25-CA-144424

TEAMSTERS JOINT COUNCIL NO. 69 A/W
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS

RESPONSE OF RESPONDENT, DIAMOND TRUCKING INC.,
TO EXCEPTIONS FILED BY THE GENERAL COUNSEL

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Respondent, Diamond Trucking Inc. ("Diamond"), files its Response to Exceptions to the Decision ("Decision") of the Administrative Law Judge ("ALJ") filed by the Counsel for the General Counsel of the National Labor Relations Board (the "Board").

I. INTRODUCTION

Citing Board law, Diamond first asked the Teamster Joint Council No. 69 (the "Union") to justify their broad requests for information unrelated to the bargaining unit employees and their terms and conditions of employment. *General Counsel* ("GC"), *Ex. 8.* The Union failed to do so and still has not done so; instead, as the ALJ found, the Union's "stated reasons for the requests are simply a restatement of the requests themselves." *Decision* at 7. Despite bearing the burden of demonstrating relevance, General Counsel's exceptions continue the Union's fatal flaw by failing to put forth evidence from the record demonstrating any reasonable basis for his belief that the information is relevant. Thus, the Board should adopt the Decision, reject the General Counsel's exceptions and dismiss the Complaint.

II. STATEMENT OF FACTS

As signatories to the Highway, Heavy, Railroad and Underground Utility Contracting Agreement, Diamond and the Union met in May 2014 to begin negotiations for a successor agreement. *GC Ex. 2.*; *Tr.* at 15:20-17:1. They were unable to reach an agreement despite multiple meetings, and, after rejecting Diamond's last offer, the Union chose to strike Diamond beginning on August 20, 2014. *Tr.* at 18:8-12; 18:17-19:6. The strike is still ongoing. *Tr.* at 40:4-5. Diamond ceased operations when the strike began and has not engaged in any operations since then. *Tr*. at 39:25-40:3. Indeed, a little less than a week after the strike began, Diamond closed its office at 2653 South 400 West, Peru, Indiana, and moved its trucks to a fenced-in

rental lot on the Grissom Reserve Base in Peru. *Tr.* at 19:12-20; 20:25-22:12. Diamond's counsel promptly notified the Union of this change. *GC Ex. 3*.

By November 2014, Diamond could no longer afford to make lease payments on the trucks it did not own or pay for space to park them. *GC Ex. 4*. Diamond therefore removed the signs from the majority of the trucks and returned them to the owner located at 2653 South 400 West location to be sold or leased to another company. *Id.* Diamond was left with only six trucks, which it parked in a different Grissom Reserve Base lot located at 1701 Thunderbolt Avenue, Peru, Indiana. *Tr.* at 22:23-4; *Respondent* ("Resp.") *Ex. 1*. Again, Diamond promptly notified the Union of this change. *Resp. Ex.* 1. On the same day, the Union sent a request for information to Diamond. The Union described this information as "necessary to determine the scope of the company's business operations and its various locations." *GC Ex.* 7. Diamond objected to producing the majority of the information, but did provide information in response to Request No. 8. *GC Ex.* 8. The Union responded and claimed that the outstanding information was necessary to determine the proper picketing locations or, in the alternative, because Diamond could be part of "a group of entities under common control." *GC Ex. 9*.

Because the information requests would not shed light on the proper picketing location and the Union failed to present a "reasonable objective basis for believing that an alter ego relationship exists" as required by current Board law, Diamond again objected to producing the requested information. *GC Ex. 10*. Diamond did provide updated information regarding Request No. 8, as that request was plainly relevant. *Id.* The Union then filed an unfair labor practice charge on January 15, 2015, and the Regional Director issued the Complaint on May 29, 2015. The case was tried on August 25, 2015, and the ALJ issued her Decision in favor of Diamond on November 24, 2015.

III. ARGUMENT

The Board should affirm the ALJ's Decision and dismiss the Complaint because, despite General Counsel's assertions to the contrary, neither the General Counsel nor the Union has ever advanced an objective, factual basis to support a belief that the requested information is necessary. Although unions have a presumptive right to information regarding bargaining unit employees and their terms and conditions of employment, the union must demonstrate the relevance of any other information requests. *See, e.g., New York 7 Presbyterian Hosp. v. NLRB*, 649 F.3d 723 (D.C. Cir. 2011); *ConAgra, Inc. v. NLRB*, 117 F.3d 1435 (D.C. Cir. 1997). Relevance is measured by whether the information is "directly related to the union's function as a bargaining representative and [whether] it appear[s] reasonably necessary for the performance of that function." *NLRB v. Leland Stanford Jr. Univ.*, 715 F.2d 473 (9th Cir. 1983).

Moreover, when a union's information request relates to a suspected alter ego relationship, the union must also demonstrate "a reasonable objective basis for believing that an alter ego relationship exists." *Contract Flooring Sys., Inc.*, 344 NLRB 925 (2000). Under black letter law, an alter ego is a disguised continuance of the predecessor – the union company ceases operations (or a substantial part) and a non-union company takes over those operations using the same employees with the equipment for the same customers. *See, e.g., Central States, Southeast & Southwest Areas Pension Fund v. Sloan*, 902 F.2d 593 (7th Cir. 1990). The objective basis for the Union's belief, therefore, must be based on facts suggesting that a disguised continuance of the operations has in fact occurred. For example, the Board found a sufficient objective basis in a case where the Union provided a letter to the employer before the hearing that "included nine separate bullet points delineating specific evidence possessed by the Union that suggested" a single, joint-employer and/or alter-ego relationship with a company named CC Coal. *Cannelton*

Indus., 339 NLRB 996 (2003). Those specific pieces of evidence included "evidence that Respondents shared a common address with CC Coal; that Respondents and CC Coal shared some of the same officers; that Respondents and CC Coal shared personnel and equipment; and that radio communications indicated the coal mined at CC Coal's Skitter Creek operation was being shipped to Cannelton's prep plant, where it was blended and processed with coal from the other Respondents." *Id.* at 996, n. 4.

Finally, a union must present its reasons for the information request at the time the request is made. The union cannot advance a new purpose for the first time at the hearing. *Gen. Elec. Co. v. NLRB*, 916 F.2d 1163 (7th Cir. 1990); *see also Sara Lee Bakery Grp., Inc.*, 514 F.3d 422, 431 (5th Cir. 2008) (holding that, even if the company was not notice as to the relevant purpose, the union still needed to articulate the specific relevance and any "attempt to manufacture a *post hoc* theory of relevance violates well-established precedent.") Although some Board decisions have permitted the union to wait to divulge the facts underlying an allegation of an alter-ego relationship until hearing, at least one circuit court has disagreed. *Cannelton*, 339 NLRB at 997 (noting that, under the facts before it, the union met its standard either way); *NLRB v. US Postal Service*, 18 F.3d 1089 (3rd Cir. 1994).

Here, General Counsel has admitted that it is the Union who bears the burden of proof when requesting information "pertaining to a suspected alter-ego relationship." *GC Exceptions* at 11. He argues, however, that the Union met that burden at trial and that it was not required to meet its burden before trial. This argument, however, is a non-starter as neither the General Counsel or the Union has advanced any argument that is sufficient under Board law to compel Diamond to produce the requested information. Indeed, to the extent General Counsel now hinges his argument on the alter-ego reasoning, his own witnesses failed to discuss that rationale.

Tr. at 55:10-59:23. As Judge Flynn noted, the Union's "stated reasons for the requests are simply a restatement of the requests themselves." *Decision* at 7. The Union did not provide an objective basis for its belief that an alter-ego relationship existed.

General Counsel now, after the trial, presents a list of facts he believes should be sufficient to meet that standard. *GC Exceptions* at 12. This argument, besides being untimely, also falls short of the evidence required. The facts presented are that "Bowyer is the brother of Pendleton;" "[e]ven though Bowyer is not an officer of Respondent, he has participated in contract negotiations with the Union and advised Pendleton regarding issues concerning contract negotiations;" "Bowyer is also affiliated with Kokomo Gravel, a non-union trucking company that hauls stone and gravel, which operates an office and place of business at 2653 South 400 West, Peru, Indiana, which is the same location of Respondent's office and place of business;" and "Respondent has also used Kokomo Gravel as a subcontractor to perform work." *Id.* What General Counsel neglects to include is that it is undisputed that Diamond only used Kokomo Gravel as a subcontractor *after* it had exhausted its list of 15-20 Union companies that performed subcontracting work. *Tr.* at 40:8-20. It is also undisputed that after Diamond ceased operations, the work it had been doing was all done by signatory union companies that were unaffiliated with Diamond. *Tr.* at 65:8-66:13. There is no allegation, let alone proof, that Diamond's work went to Kokomo Gravel or any other non-union company. Because General Counsel could present no facts suggesting an alter-ego relationship, the ALJ properly found Diamond did not have to comply with the information request. Indeed, the ALJ noted that "[e]ven if Bowyer or Kokomo owns those trucks, rather than DT Trucking, that does not provide support for the Union's position. There is not one iota of support for an alter-ego theory."

Ultimately, General Counsel seems to be advancing the position that the Union has an objective, factual basis for believing an alter-ego relationship exists wherever a union company has a "business relationship" with another company. *GC Exceptions* at 12. This cannot possibly be the law, or union businesses would routinely be forced to turn over sensitive information regarding virtually all of its contractual relationships, no matter how distant from an alter-ego relationship. Unlike the union in *Cannelton*, the Union and the General Counsel in this matter have failed to present any evidence that Diamond sought to avoid its collective bargaining obligations by passing along its work to Kokomo Gravel or any other non-union company. Without some shred of evidence to support its request, the Board should not compel Diamond to answer the information request.

IV. CONCLUSION

For all the foregoing reasons, Diamond respectfully requests the General Counsel's exceptions be rejected, that the ALJ's Decision be adopted, and that the Complaint be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2016, a copy of the foregoing was filed electronically with the National Labor Relations Board – Office of Executive Secretary/Board. Notice of this filing and the Response of Respondent, Diamond Trucking, Inc., to Exceptions Filed by the General Counsel, will be sent to the following counsel of record by E-Mail and First Class U.S. Mail:

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